Government of the Federation of Malaysia v Lee Tain Tshung

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K 1202 OF 1987
SYED AHMAD IDID JC
3 MAY 1991

Revenue Law *— Income tax — Certificate of Inland Revenue Department that defendant owed amount of income tax — Defendant denied amount claimed subject to income tax — Whether certificate applicable — Income Tax Act 1967 s 142(1) & (2)*

Civil Procedure *— Summary judgment — Six months delay in filing application — Whether permissible*

The plaintiffs claimed for the sum of $592,524.24 from the defendant as income tax and penalty under the Income Tax Act 1967 ('the Act'). The plaintiffs applied for summary judgment against the defendant six months later. One reason for the delay was that the defendant had raised a number of issues in his statement of defence in respect of which the plaintiffs had to refer to their assessing unit for their opinion to prepare the O 14 application. The other reason was that the plaintiffs' officer-in-charge of the matter was transferred to Kuala Lumpur which led to the misfiling of the defendant's file. The plaintiffs' application was supported by a certificate signed by the senior assistant director of Inland Revenue under s 142(1) of the Act which stated the sum due from the defendant as income tax and penalty. The defendant denied that he owed such a sum to the plaintiffs, inter alia, on the ground that the sum claimed was charged on capital receipts which were not taxable. The defendant also argued that the certificate did not apply where there was no income tax due and payable from him to the plaintiff.

Held, allowing the application:

(1) The plaintiffs' delay of six months in applying for summary judgment against the defendant was permissible.

(2) Immediately upon the issuance of the certificate, the amount of income tax due could no longer be questioned and the certificate is sufficient authority for the court to give judgment for that amount.

(3) The defendant had not provided any proof that the certificate is neither genuine nor true.

[Bahasa Malaysia summary

Plaintif telah menuntut jumlah $592, 524.24 daripada defendan sebagai cukai pendapatan dan penalti di bawah Akta Cukai Pendapatan 1967 ('Akta itu'). Plaintif memohon penghakiman terus terhadap defendan enam bulan kemudian. Satu sebab kelengahan itu adalah kerana

defendan telah menimbulkan beberapa isu dalam pernyataan pembelaannya berkenaan dengan mana plaintif terpaksa merujuk kepada unit pentaksiran mereka untuk pendapat mereka bagi menyediakan permohonan A14. Sebab yang lain adalah bahawa pegawai yang bertanggung jawab akan perkara itu telah dipindahkan ke Kuala Lumpur yang menyebabkan fail defendan salah difail. Permohonan plaintif disokong oleh sijil yang ditandatangani oleh penolong kanan pengarah Jabatan Hasil Dalam Negeri di bawah s 142(1) Akta itu yang menyatakan jumlah wang yang kena dibayar oleh defendan sebagai cukai pendapatan dan penalti. Defendan menafikan bahawa beliau berhutang jumlah wang sebanyak itu kepada plaintif, antara lainnya, atas alasan bahawa jumlah wang tuntutan dikenakan bayaran atas resit modal yang tidak boleh dikenakan cukai. Defendan juga berhujah bahawa sijil tersebut tidak terpakai di mana tiada cukai pendapatan kena dibayar daripada beliau kepada plaintif.

Diputuskan, membenarkan permohonan itu:

(1) Kelengahan plaintif selama enam bulan dalam memohonkan penghakiman terus terhadap defendan dibenarkan.
(2) Dengan segera atas pengeluaran sijil tersebut, jumlah wang cukai pendapatan yang kena dibayar tidak boleh dipersoalkan lagi dan sijil itu adalah kuasa yang mencukupi bagi mahkamah untuk memberi penghakiman untuk jumlah wang tersebut.
(3) Defendan tidak memberi sebarang bukti yang sijil itu bukan tulen dan bukan juga benar.]

Cases referred to

1 *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 (refd)
2 *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276 (refd)
3 *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 (refd)
4 *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 282 (refd)
5 *Comptroller of Income Tax v CD Ltd* [1967] 1 MLJ 11 (refd)
6 *Government of Malaysia v DC* [1973] 1 MLJ 161 (follD)
7 *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 (follD)

Legislation referred to

Income Tax Act 1967 ss 96, 99, 103(1), (4), (5A), 106(3), 142(1), (2)
Rules of the High Court 1980 O 14

Mohamed Bazain bin Idris (Senior Federal Counsel, Inland Revenue Department) for the plaintiffs.
Patricia Hiew (Chau & Thien Co) for the defendant.

Syed Ahmad Idid JC: The plaintiffs' claim is for $592,524.24 due from the defendant as income tax and penalty under the Income Tax Act 1967 ('the Act') and the plaintiffs pray for judgment for:

(a) the sum of $592,524.24;
(b) interest thereon at the rate of 8% pa from the date of judgment to the date of payment:
(c) costs of this suit;
(d) such further and other reliefs as the court deems fit.

From the records, this matter has come before the court on more than three occasions since 1987. The hearing and the written submissions were completed between 28 January 1991 and 4 March 1991.

On 6 May, the plaintiffs filed a summons-in-chambers asking to enter final judgment under O 14 of the Rules of the High Court 1980 on two grounds:

(a) a certificate signed by the senior assistant director of Inland Revenue giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence and authority for the court to give judgment;
(b) there is no defence to this suit.

On 20 July 1988, Lee Beng Hock of Unit SH 01-24.3 Jabatan Hasil Dalam Negeri explained that the delay in filing of the O 14 application was due to two reasons:

(a) the statement of defence dated 20 November 1987 filed by the defendant's counsel raised a number of issues and the plaintiffs' civil suit unit had to refer the matter to the plaintiffs' assessing unit for their opinion and for the purpose of preparing the O 14 application;
(b) before the O 14 application could be prepared the officer-in-charge of the civil suit in the plaintiffs' branch in Kota Kinabalu was transferred to Kuala Lumpur and this situation inadvertently led to the misfiling of the defendant's file.

Mr Lee Beng Hock, an examiner in the Department of Inland Revenue, signed an affidavit on 9 February 1988 affirming that:

(a) The defendant, Lee Tain Tshung @ Lee Thien Chiung, is justly and truly indebted to the plaintiff in the sum of $592,524.24 being income tax due for the year of assessment 1974 additional and increases of income tax levied under s 103(4) and 103(5A) of the Act.
(b) As required by the provisions of s 96 of the Act, the defendant had been notified of the amount of chargeable income, the tax charged thereon, the place at which payment is to be made, the penalty for late payment increases imposed by s 103(4) and 103(5A) of the Act, and his rights of appeal under s 99 of the Act.
(c) With reference to para 2(a), (b), (c), and (d) of the statement of defence filed in court, the income tax for the year of assessment was raised under the provisions of the Act. The defendant appealed against the said assessment and his appeal will be dealt with according to s 99 of the Act.
(d) A certificate under s 142(1) of the Act, signed by the senior assistant director for and on behalf of the Director-General of Inland Revenue

shall be sufficient evidence and authority for the court to give judgment for the amount. A

Five months later, on 7 July 1988, the defendant filed an affidavit-in-opposition where:

(1) He denied he was indebted to the plaintiffs in the sum of $592,524.24 being income tax as alleged or at all on the following grounds: B

(a) The alleged tax of $513,008 was purported to be charged on capital receipts of $600,000.

(b) Capital receipts amount to $600,000 arising from the realization of investment in a rubber estate contained in CL 2016, District of Kota Kinabalu, to repay loan/overdraft facilities demanded by Bank Bumiputra Malaysia Bhd does not constitute gains or profits from a business and therefore should not be included as taxable income. CL 2016 was charged to Bank Bumiputra Malaysia Bhd for $1/4m from 13 June 1972 for a quarry operation by him under the name and style of The Sun Enterprise. C D

(c) The realization of the investment was also for the satisfaction of outstanding amount demanded by MIDF for a quarry project loan amounting to $250,000 for which he could not service from income generated by the quarry operation.

(d) At the time of disposal of the said CL 2016 in 1973 defendant was a civil servant and all details of the sale relating to CL 2016 was given to a senior officer of Income Tax, the late Vivian Thien, who confirmed that the gain was not taxable under any law in force at that time. E

(e) The present income tax raised would be tantamount to suggesting that he was trading on land having land as the stock item. This was by no means true as the subsequent sale of another piece of land contained in CL 2071 in 1978 (which was also charged to Bank Bumiputra Malaysia Bhd for banking facility and which forced him to sell to satisfy the repayment to the said bank) attracted property gains tax which he had paid. F G

(2) (a) The defendant referred to para 9 of the affidavit of Lee Beng Hock wherein it was stated that the income tax claimed herein was raised under the provisions of the Act. The defendant repeated his earlier defence (see para 4(1) above). He also said that income tax could not be raised on 'capital receipts' of $600,000 under the provisions of the Act. H

(b) The defendant believed that s 103(1) and s 106(3) of the Act do not apply to his case as there is no tax due and payable by him to the plaintiffs (for the reasons set out in para 4(1) above). He further claimed that his defence does not come within any of the 'prohibited pleas' mentioned in the said s 106(3) and he is therefore not precluded from raising his defence in our court. I

(3) The defendant, in referring to para 10 of Lee Beng Hock's affidavit, said he believed that s 142(1) of the Act has no application in a case

where his defence is that there is no tax due and payable by him to the plaintiffs.

At the hearing on 28 January 1991, the learned senior federal counsel cited:

(1) *Chong Woo Yit v Government of Malaysia*[1] where the relevant Supreme Court decision hinges on such civil proceedings being brought by the government. Gunn Chit Tuan SCJ opined that the court, unlike the special commissioners of Income Tax, has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased;
(2) *Government of Malaysia v Abdul Rahman*;[2]
(3) *Sun Man Tobacco Co Ltd v Government of Malaysia*;[3]
(4) *Comptroller of Income Tax v A Co Ltd.*[4]

The learned defence counsel urged the court to take note that the operation of s 106(3) of the Act would depend on whether the defence raised by a defendant has offended s 106(3) itself. She claimed that the defendant is not objecting to the amount assessed and the defence raised is therefore not caught by s 106(3) of the Act. The defendant submitted that all the cases cited by the learned federal counsel can be distinguished from the present case as the defendant is not objecting to the amount assessed but merely saying that there is no tax due and payable at all by the defendant to the plaintiffs for various reasons and is therefore not caught by s 106(3). Thus, the defendant should not be precluded from raising his defence in court.

It is pertinent to note that s 106(3) as worded did not state that the defendant is precluded from raising a defence at all but s 106(3) confined itself to certain 'pleas' which cannot be raised. The question whether the plaintiffs' argument or the defendant's argument on this point is correct itself raises a triable issue of law. However, under the provisions of s 103(1) of the Act, tax is payable on the service of the notice of assessment, whether or not that person appeals against the said assessment. Further, under s 106(3) of the Act, the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) and (5A) of the Act.

The plaintiffs here seek to rely on s 142(1) of the Act and the learned federal counsel cited the case of *Comptroller of Income Tax v CD Ltd*[5] at p 13 to support the plaintiffs' contention that the certificate issued under s 142(1) of the Act is prima facie evidence of the amount due and is thereby conclusive. But the defendant claimed that despite the wording in s 142(1) which states that the certificate signed by the Director-General '...shall be sufficient evidence of the amount due and sufficient authority for the Court to give judgment for that amount', the said certificate is not conclusive. It only precludes a challenge to the said certificate insofar as the existence and the amount of the sum is concerned.

The defendant if allowed to go to trial would further say that since the defendant's defence is that there is no tax due and payable by the defendant to the plaintiffs, the said s 142(1) has no application here.

Conclusion

I shall deal with the following and rule on each as I go along:

(a) Delay in filing O 14 application

The delay of six months is permissible. Cases quoted in court show that previous courts have accepted similar grounds but with the advent of modern technology I hope such a large department as the Inland Revenue Department will no longer raise problems of misfiling of files or even of having to take long periods of time to refer to special units.

(b) Section 96 of the Act

The case of *Government of Malaysia v DC*[6] is relevant where it was held that such a certificate under s 142(1) of the Act is 'sufficient authority for the court to give judgment for that amount'. A proper reading of this section must reasonably mean that immediately upon the issuance of the certificate, the amount of tax due could no longer be questioned.

(c) Section 106(3) of the Act

Although the defendant believed that this section cannot apply to his case, by *Arumugam Pillai v Government of Malaysia*,[7] the Federal Court held that by reason of the operation of s 106(3) of the Act 'the court, to put it bluntly, had only one function to perform and that was to give judgment in favour of the government' per Gill CJ (Malaya). This case also held that 'the learned judge did not err in law in holding that s 106(3) of the Income Tax Act 1967 prevented him from entertaining the defence put up by the appellant '.

(d) Certificate issued under s 142(1) of the Act

The defendant, if allowed to go to trial, would argue that the presumption under s 142(1) must be read together with s 142(2) which says:

> In criminal or civil proceedings under this Act any statement purporting to be signed by the Director-General or any authorised officer which forms part of or is annexed to the information, complaint or statement of claim, shall, until the contrary is proved, be evidence of any fact stated therein.

Learned counsel further stated that the phrase 'until the contrary is proved' shows that the presumption raised under s 142(1) is rebuttable and no evidence presented is conclusive and therefore the conclusiveness of the said certificate must come from evidence and proof and not just mere assertion. But the defendant has not provided any proof that the certificate is neither genuine nor true.

(e) The Act deals with taxes

What this court has to deal with is that the Act deals with taxes and this must be accepted as a legislative machinery for the speedy collection, recovery and repayment of tax. It is also an answer to the delaying tactics of tax-payers in lodging objections and appeals.

(f) On the basis of facts and principles, the plaintiffs' application is adequately made out. Mr Lee Beng Hock (see para 3(b)) stated on 9 February 1988 that the 'defendant's appeal will be dealt with according to s 99 of the Income Tax Act 1967'. This was about three years ago. The speed at which appeals are disposed of by the Inland Revenue Department depends on the administrative machinery and efficiency obtaining at the time.

(g) Subject to the Inland Revenue Department fulfilling the undertaking as given by Mr Lee Beng Hock at (f) above, the court grants an order-in-terms of the plaintiffs' application.

Application allowed.

Reported by Wong Kian Kheong